Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Seth Bader, *Petitioner*

v.

State of New Hampshire, *Respondent*

On Petition for Writ of Certiorari
To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

ATTY. B. MICHAEL CORMIER
Counsel of Record
86 SUMMER STREET
HAVERHILL, MA 01830
978-374-0924

10 pp

Questions Presented

I. Should certiorari be granted where a state supreme court has held that a judge who recused himself from a case following an exchange of criticism with a litigant may preside over another case involving the same litigant?

II. Should certiorari be granted where a state supreme court found no violation of the Confrontation Clause in a trial where a jury repeatedly heard inculpatory statements from an unavailable declarant?

III. Should certiorari be granted where a state supreme court held that jurors who asked to speak to the trial judge about coercive behavior by the jury foreperson need not be voir dired?

IV. Should certiorari be granted where a state supreme court held that no evidentiary hearing is required as to a recantation of perjured testimony by a prosecution witness?

List of Parties

The petitioner is Seth Bader, an inmate at the N.H. State Prison for Men, P.O. Box 14, Concord, N.H. 03302-0014.

The petitioner is represented by Attorney Paul J. Haley 460 W. Main Street, P.O. Box 1868, Hillsboro, NH 03244. Telephone (603) 478-7878.

The respondent is the N.H. Attorney General's Office, 33 Capitol Street, Concord, N.H. 03301-6397. Telephone (603) 271-3671.

The New Hampshire Supreme Court is located at 1 Noble Drive, Concord, N.H. 03301-6160. Telephone (603) 271-2646.

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State v. Seth Bader, _____N.H. _____, _____ A.2d _____, slip opinion no. 98-472 of September 13, 2002, motion to reconsider denied on October 18, 2002.

Statement of Jurisdiction

This is a petition for a writ of certiorari directed to a state's highest court within 90 days of that court's denial of a motion to reconsider an appeal that raised federal issues. The United States Supreme Court has jurisdiction to grant this writ of certiorari under 28 U.S. Code §1257, and this petition is timely under 28 U.S. Code §§2101 and 2104.

Constitutional Provisions

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to ... a ... trial, by an impartial jury ... and ...to be confronted with the witnesses against him..."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTION ONE

" ...nor shall any State deprive any person of ... liberty ...without due process of law..."

Statement of the Case

PROCEDURAL HISTORY

The petitioner was convicted of first degree murder and of conspiracy to commit murder in state superior court following a jury trial. A sentence of life imprisonment without the possibility of parole was imposed. A direct appeal was timely filed in and accepted by the state supreme court. That appeal was stayed to allow litigation of a motion for new trial in the superior court. The denial of that motion was also timely appealed. The direct appeal and the appeal from the new trial motion were consolidated. After briefing and oral argument, the state supreme court affirmed the conviction. A timely motion to reconsider was denied. The state supreme court noted in its opinion that the petitioner had presented federal questions as to all of the issues presented herein. This petition ensues.

FACTS AS TO JUDICIAL RECUSAL ISSUE

In April of 1997, the petitioner was arrested for first-degree murder and for conspiracy to murder his ex-wife, Vicki Bader. At the same time, Vicki's estate commenced a civil action against the petitioner for wrongful death. On the morning of the first business day after the petitioner's arrest, the estate obtained an *ex parte* attachment against the petitioner's entire net worth. The attachment papers explicitly stated that the attachment was intended to prevent the petitioner from retaining criminal counsel, and that the only evidentiary basis for this attachment was the bare fact of the petitioner's arrest. Judge Walter Murphy of Rockingham Superior Court granted this *ex parte* attachment. He was later assigned to preside over the criminal matter as well. During that spring, Judge Murphy presided over a bail hearing in the criminal matter. At the state's request, he quashed the petitioner's subpoenas for putative prosecution witnesses; the petitioner had sought to examine them at the bail hearing to show that the state's case was so weak that very low bail was

warranted. Judge Murphy then set bail at an amount that the petitioner could have met but for the *ex parte* attachment.

In September, 1997, the petitioner sought a writ of habeas corpus from the state supreme court to challenge the bail order. In that petition, the petitioner used the words "chimera" and "empty exercise" to describe Judge Murphy's handling of the early stages of the case. In effect, the petitioner accused Judge Murphy of conducting a sham proceeding with a pre-determined outcome in a high-profile case.

In November of 1997, Judge Murphy recused himself from the civil case, but remained on the criminal case. At a December 4, 1997 motion hearing in the criminal case, the following occurred at Transcript 12/4/97, page 8, lines 4-7:

> THE COURT: - recused myself from the consideration of [the civil case] because of a writ of habeas corpus that was filed on your behalf, which I thought contained all kinds of misstatements.

Judge Murphy never explained why objectionable statements in the criminal case would be cause for him to recuse himself not from that case but only from the related civil case.

The petitioner later argued before both the superior court and the state supreme court that once Judge Murphy had recused himself from one of the petitioner's cases, due process required that he be recused from all of the petitioner's cases. The state courts rejected this argument. The state supreme court noted in its ruling that the petitioner had presented a federal argument on this issue, but the state supreme court declined to decide it, on the ground that state law was more protective of the petitioner's rights than was federal law.

FACTS AS TO CONFRONTATION CLAUSE ISSUE

Intent to kill is an element of both the first-degree murder indictment and the murder conspiracy indictments against the petitioner. At trial, the state sought to prove that element

of the indictments through the testimony of Vicki's physician, Dr. James Fieseher (pronounced "Fisher") about a conversation between himself and Vicki that supposedly occurred during a routine physical examination over a year prior to her death. Dr. Fieseher had advised Vicki to relieve her high blood pressure by losing weight; she allegedly refused to do so because she feared being murdered and wanted to make her body hard to move. The trial testimony about that conversation was as follows:

> DR. FEISEHER:...she really thought that, frankly, that she was going to die...
>
> PROSECUTOR: Did she tell you how she thought she was going to die?
>
> DR. FEISEHER: No. But she thought her ex-husband was going to kill her.
>
> DEFENSE COUNSEL: Objection, your honor.
>
> THE COURT: I'm going to sustain that objection and ask the jury to disregard it.

The above exchange occurred on April 1, 1998, at Trial Transcript, Day 5, page 36, line 20, to page 37, line 4. That same day, at page 39, lines 1-5, the prosecutor offered an argument at a bench conference for the relevance of the doctor's account of Vicki's supposed statements:

> PROSECUTOR: ...what it goes to prove in this case is it proves intent and motive...his intent and motive to kill her.

Immediately after the bench conference, the state returned to the same topic, at page 39, line 22, to page 40, line 23:

> DR. FIESEHER:...she had, in her own mind, envisioned her ex-husband trying to move her - her body.

DEFENSE COUNSEL: Your Honor, I'm going to object.

THE COURT: Sustained.

DEFENSE COUNSEL: I'd ask that this be stricken.

THE COURT: The jury -the jury's instructed to disregard that last remark as not responsive.

PROSECUTOR: Was she joking when she said it to you, as far as you could tell?

DEFENSE COUNSEL: Your Honor, could we approach on this?

THE COURT: I'll sustain the objection...

DEFENSE COUNSEL: Thank you.

THE COURT:...if that's what you want me to do.

PROSECUTOR: Based on your observation of her demeanor, did she appear to be joking to you?

DEFENSE COUNSEL: Your Honor, same objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Thank you.

PROSECUTOR: And when was the statement made about making the body difficult to move?

DEFENSE COUNSEL: Your Honor, same objection. It's going back to the same objectionable material.

THE COURT: Overruled.

PROSECUTOR: When did she say this to you?

DR. FEISEHER: In July of 1995. (13 months prior to her August 1996 murder.)

Later that same day, Dr. Feiseher was cross examined by defense counsel. Relevant portions of that cross examination, from Trial Transcript, Day 5, page 45, line 23, to page 46, line 7, are as follows:

DEFENSE COUNSEL: Did you know that she was hospitalized seven times for psychiatric problems.

DR. FEISEHER: I—I did not know that.

DEFENSE COUNSEL: So she hid four admissions from you, were you aware of that?

DR. FEISEHER: Well, apparently not.

DEFENSE COUNSEL: She wasn't being entirely candid and frank with you when she was going over her history with you, was she?

DR. FEISEHER: No.

In short, when Vicki's doctor told her to lose weight, she supposedly replied that she wanted to remain obese so as to foil the petitioner's plot to murder her by making her body difficult to move. She was speaking over a year before her death, and she made no allegation that the petitioner had ever attempted or even threatened to murder her. The state sought to use this fortune-telling hearsay from an unavailable and mentally ill declarant to prove an element of the indictments.

The state supreme court noted in its ruling that the petitioner had raised the Confrontation Clause as an argument against the propriety of this testimony. That court found that the testimony had been rendered harmless by the trial court's instructions to the jury to disregard some (although not all) of it.

FACTS AS TO JUROR ISSUE

There was a long jury deliberation in this matter. On Thursday, May 7, 1998, the jury was several days into that deliberation. On that day, there was a chambers conference at which the following occurred:

BAILIFF KROOK:...they wanted to see the Judge... the jurors was extremely upset and almost to the point of

tears. And they were insistent about wanting to see the judge and talk about that they couldn't get it across to the foreperson, that they couldn't get her to agree about them wanting to get their questions, she wouldn't accept their questions. (Transcript 5/7/98, page 3, lines 10-17.)

BAILIFF DALEY:...I was approached by [two jurors] ...where they reported to me...a conflict with the jury foreperson. They had a question and they wanted to submit it to the judge, but she wouldn't do it...[one juror] appeared very upset, near tears. (Id. at p.5, line 17-p.6, line 2.)

THE COURT:...the jurors themselves have requested that they speak to the court... (Id. at p.10, lines 2-3.)

THE COURT: The only issue left is whether or not... to question the jurors...[eight minute recess] I am going to decline to talk to the two jurors. (Id. at p.13, lines 11-22.)

It was never learned what questions those two jurors wanted answered, why the foreperson did not want those questions to reach the court, or how the foreperson prevented the two jurors from conveying their questions directly to the bailiffs.

At least one question from jurors did reach the court. The following also occurred at the May 7, 1998 chambers conference:

THE COURT: "The jury would like to know, if we have reached a verdict on one of the two charges, do we need to inform you of that fact, or do we wait until we have a decision on both charges?" (Id. at p.5, lines 2-5.)

DEFENSE COUNSEL: I think perhaps you should say, "If you are unable to reach a verdict on both charges, let the court know." (Id. at p.15, lines 20-22.)

THE COURT: "Continue your deliberations until both verdicts have been determined." (Id. at p.16, lines 14-5.)

The next day, Friday, May 8, 1998, the twenty-first day of the trial, there was a jury verdict of "guilty" on both charges. The following occurred that day, at Trial Transcript, Day 21, page 7, line 12 to page 8, line 13:

DEFENSE COUNSEL: Your Honor, at this time, we would ask for individual voir dire of [the two jurors]...It was clear that one of those two jurors was in tears as she left the court today. That's a juror who asked the bailiff to notify the court that she wished to speak to the court earlier.

THE COURT: All right. The defendant's motion is denied.

The state supreme court noted in its ruling that the petitioner had alleged a violation of the Jury Trial Clause. That court found, on these facts, no violation of the petitioner's right to the uncoerced verdict of twelve impartial jurors.

FACTS AS TO RECANTED PERJURY ISSUE

The evidence presented at trial included no physical evidence linking the petitioner to his ex-wife's murder, no confessions or admissions by the petitioner, and no testimony by uninvolved eyewitnesses to any aspect of the murder. The state's case rested upon the testimony of two alleged accomplices. These were Joseph Bader, a relative of the petitioner, and Sandro Stuto, an acquaintance of the petitioner's then fiancé. Trial testimony showed that both of them had received substantial leniency from the state and that both of them had made changes in their stories to fit the state's theory of the case. The state, in both its opening and its closing, urged the jurors to rely on Stuto's testimony to overcome reasonable

doubt. The state, in its closing, also vouched for the truth of Stuto's testimony.

After the trial, a new witness, "John Doe", became known. He is referred to by a pseudonym for his safety, as he is currently a prison inmate. His true name is known to the state. He has made a statement that he was a cellmate of Stuto's and that Stuto recanted his trial testimony and offered a completely different story about the murder - one which wholly exculpated the petitioner of his ex-wife's murder. On May 21, 2001, "Doe" submitted to a polygraph examination and simultaneously made a videotaped statement, which was subsequently transcribed and placed before the state supreme court. That transcript, at page 19, lines 3-6, contains the following:

> POLYGRAPH EXAMINER: Okay. Did Sandro Stuto tell you that he lied during the trial and that it was not Seth Bader who fired that fatal shot into his ex-wife Vicki?
>
> DOE: Yes.

Counsel for the state has adamantly refused to take part in listening to or following up on "Doe's information. The state superior court declined to grant a new trial or even to hold an evidentiary hearing on the new trial motion. In effect, the superior court adopted the state's position, repeatedly expressed in its pleadings, that the state has not the slightest obligation to investigate whether "Doe" is telling the truth about Stuto's recantation of his perjured trial testimony. The state supreme court noted in its ruling that the petitioner had alleged a violation of the Due Process Clause in the denial of an evidentiary hearing as to the recantation. That court found on these facts no denial of due process.

Reasons for Granting the Writ

I. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HAS HELD THAT A JUDGE WHO RECUSED HIMSELF FROM A CASE FOLLOWING AN EXCHANGE OF CRITICISM WITH A LITIGANT MAY PRESIDE OVER ANOTHER CASE INVOLVING THE SAME LITIGANT.

The petitioner asks this Court to hold that once a judge is recused from a case involving a particular litigant, he is always recused from cases involving that litigant. Such a holding would be consistent with this Court's judicial recusal jurisprudence and would resolve a split between the New Hampshire Supreme Court and the United States Court of Appeals for the First Circuit.

In the instant case, the New Hampshire Supreme Court held that a judge who recused himself from a case following an exchange of criticism with a litigant could still preside over another case, contemporaneous and factually related, involving the same litigant. That court based its holding on its opinion that the judge in question need not have recused himself from the first case. But that opinion begs the question of whether the bare fact that the judge had recused himself, necessarily or not, created an appearance of bias and hence a due process violation if that judge had any further involvement with the litigant. The state supreme court's holding does not mesh with the basic principles of this Court's holdings on judicial impartiality and is contrary to the holding of apparently the only United States Court of Appeals to address a similar -although not identical -fact pattern.

This Court long ago held that constitutional due process requires unbiased judges in all state and federal proceedings. Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972), In re Murchison, 349 U.S. 133, 136 (1955), Tumey v. Ohio, 273 U.S. 510, 523 (1927).

It is also well settled that due process is violated by an appearance of judicial bias, even if the judge in question does not consider himself biased. Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 859-61 (1988), In re Murchison, supra, Liteky v. U.S., 510 U.S. 540, 548 (1994).

Judicial opinions originating in the courtroom are not usually grounds for recusal, but may be such in extreme circumstances. Liteky v. U.S., 510 U.S. at 551.

The failure of a judge to recuse himself where recusal is warranted is always reversible error, regardless of whether any particular "harm to a litigant can be shown; harmless error analysis does not apply to judicial bias. Chapman v. California, 386 U.S. 18, 23 (1967), Tumey v. Ohio, supra.

In El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136 (lst Cir. 1994), the First Circuit held that where a judge has recused himself from a case, he can take no further action on that case except to transfer it to another judge; in particular, such a judge cannot even reconsider his own recusal if he determines that it was unnecessary. This is in accordance with the doctrine that even the appearance of judicial bias is a due process violation; it would occasion such an appearance if a judge who at one point held himself out to the world as recusal-worthy had any further involvement with the case.

However, recusal is ultimately based not on possible bias against a case but on possible bias against the parties to the case. Thus, once a judge -however mistakenly - determines that he cannot preside over a case because of something a litigant said, he ought not to preside over another case involving the same litigant. This is especially so where the two cases involve a shared fact pattern and are contemporaneous, and where the decision in one case will ultimately decide the key issue in both cases. That was the situation here, where the trial judge recused himself from a civil action for wrongful death but continued to preside over the underlying murder trial. Certiorari should be granted here to clarify that once a judge is recused he is always recused, thus re-

solving a split on this issue between the N.H. Supreme Court and the First Circuit.

II. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT FOUND NO VIOLATION OF THE CONFRONTATION CLAUSE IN A TRIAL WHERE A JURY REPEATEDLY HEARD INCULPATORY STATEMENTS FROM AN UNAVAILABLE DECLARANT.

The petitioner asks this Court to hold that testimony which would not be admissible directly from a declarant cannot be introduced via hearsay from an unavailable declarant to accuse a criminal defendant of an element of the indictments against him. The state-court error of law in allowing such non-cross-examined testimony to be admitted into evidence contradicts this Court's well-settled precedents and should be reversed.

In the instant case, the New Hampshire Supreme Court found no violation of the Confrontation Clause where the petitioner was accused of an element of the indictments against him by an unavailable declarant who was engaging in fortune-telling as to an event that had not yet occurred. Specifically, the state court found no error where a jury was told to disregard some but not all of the statements allegedly made by the victim, the petitioner's ex-wife Vicki, accusing the petitioner of intending to harm her by unspecified means at an unspecified future time, where those statements had been told to the jury by Vicki's physician under the medical diagnosis hearsay exception. No allegations of violent behavior or even of threats of violence by the petitioner were made by Vicki to her physician. Had Vicki herself taken the stand, she would not have been allowed to speculate that someone intended to kill her by unknown means at an unknown future time. But Vicki's physician was allowed to offer just such testimony, from a declarant who was unavailable for cross examination, thus providing the state with the element of intent in the indictments. The state elicited testi-

mony from Vicki's physician that he had advised Vicki to relieve her high blood pressure by losing weight. This testimony was admitted under the medical diagnosis hearsay exception. The physician went on to testify that Vicki rejected his advice about losing weight on the ground that she believed that the petitioner planned to murder her and that she wanted to foil the plot by remaining obese, thus making her body difficult to dispose of. The first time the state elicited this testimony, the petitioner objected; the trial court sustained the objection and ordered the jury to disregard the testimony. The state then proceeded to elicit the same testimony three more times within a very few minutes, covered in four transcript pages. Each time the trial court sustained an objection and ordered the jury to disregard the testimony. The state then asked the physician the time" frame of these statements, which was over a year before Vicki's death. The petitioner's objection to that testimony was overruled. Thus, the jury was told the time frame of a conversation that it had just been told four times to disregard. Telling the jury the time frame of a conversation that it had been instructed to disregard necessarily put that conversation itself back into evidence. The state argued at a bench conference that this testimony was relevant to establish the petitioner's intent to kill his ex-wife Vicki. On cross-examination, it was shown that Vicki had both a severe psychiatric history and a history of lying to her physician. The net result of this testimony was that the petitioner was completely deprived of his right to cross examine a mentally ill declarant as to her fortune-telling which had accused the petitioner of an element of the gravest of criminal charges.

"A complete denial of cross-examination constitutes constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966). The curative jury instruction was useless to unring the bell the state had rung to establish intent. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers

know to be unmitigated fiction." Krulewitch v. U.S., 336 U.S. 440, 453 (1949). The bare fact that the petitioner was accused of an element of the indictments by a declarant unavailable for cross-examination is enough to completely undermine the petitioner's conviction. Vicki Bader, speaking through the mouth of her physician, could not be disregarded by the jurors, in spite of an instruction to do so, for two reasons. First, the jury was allowed to hear testimony as to the time frame of the statements that they had been told four times to disregard. As discussed above, they could only have taken the time frame testimony as reviving the prior testimony and superseding the instructions to disregard that testimony. Second, this Court has held that jury instructions are ineffective as a matter of law to cure a jury's exposure to inculpatory statements from a co-defendant who is unavailable for cross examination, Bruton v. U.S., 391 U.S. 123, 136 (1968), or to cure a jury's exposure to a coerced confession, Jackson v. Denno, 378 U.S. 368, (1964). The circumstances of this case show that a hearsay exception was used to admit testimony of such low reliability - fortune-telling- that it would not be admissible even if the declarant had been available for cross-examination. The combination of unreliable testimony and an unavailable declarant add up to a structural error in the instant case.

"A state determination may be set aside...if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing principle to a context in which the principle should have controlled." Ramdass v. Angelone, 530 U.S. 156, 166 (2000). That is precisely what happened here -the state supreme court refused to apply the principles of Brookhart, Krulewitch, Bruton, and Jackson to a recognizable variant fact pattern where an accusing declarant was unavailable for cross examination.

This Court has held that the admissibility of hearsay evidence under the Confrontation Clause must depend on the evidence's inherent reliability and cannot be determined with reference to other evidence adduced at trial. Lilly v. Virginia,

527 U.S. 116, 138-9 (1999). Thus, the state cannot use its theory that the petitioner is to blame for Vicki's unavailability to justify admitting evidence to prove that theory or to admit fortune-telling as to events months or years in the future to prove an element of its indictments.

This issue breaks little new ground in the law. Rather, it is a case where a state court has decided an issue in a way that conflicts with this Court's well-settled precedents. In Lilly, this Court vacated a Virginia murder conviction because a state court had disregarded the well-settled Bruton rule. For much the same reason, certiorari should be granted here.

III. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HELD THAT JURORS WHO ASKED TO SPEAK TO THE TRIAL COURT ABOUT COERCIVE BEHAVIOR BY THE JURY FOREPERSON NEED NOT BE VOIR DIRED.

The petitioner asks this Court to reaffirm its holding that an accused's allegation of either an extrinsic or an intrinsic juror incident requires the trial judge to voir dire the jurors involved on the record in order for the trial court's findings about the incident to receive any deference on appeal. A state supreme court has made a holding on that issue in this case which is diametrically opposed to the precedent of this Court, the precedent of the United states Courts of Appeal, and even to the state court's own precedent. The state court's error of law in upsetting such well-settled precedent and thus creating a split between itself and virtually every other court to consider this issue should be reversed.

In the instant case, the N.H. Supreme Court made the following holding as to a situation where the petitioner supported the request of two jurors to be voir dired concerning the jury foreperson's interference with their submission of questions:

"[Where a] defendant has made no claim of extrinsic contact...[but] the defendant has alleged that intra-jury misconduct prejudiced his right to a fair trial...[he] has the burden of proving actual prejudice...Absent proof of actual prejudice, it was within the trial court's discretion to determine the nature and extent of its inquiry into the situation...[this is a] fact-specific determination...the decision not to conduct individual juror voir dire [is discretionary] [internal citations omitted]"

State v. Seth Bader, ___N.H.____ slip opinion no. 98-472, September 2002. That court went on to hold that whatever problem had existed amongst the jurors had been resolved when the trial judge instructed them that they must continue to deliberate until they reached a verdict on both counts of an indictment rather than just one count.

The fatal flaw in the state supreme court's holding may be seen when it is contrasted to this Court's leading recent holding oil juror incidents. In Smith v. Phillips, 455 U.S. 209, 215-6 (1982), this Court said:

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. For example, in Remmer v. U.S., [citation omitted] a juror was approached by someone...the [U.S. Supreme] Court instructed the trial judge to determine the circumstances, the impact thereof upon the juror, and whether or not they were prejudicial, in a hearing with all parties permitted to participate. [internal quotation marks omitted]".

The Smith Court went on to hold that a trial court's fact-finding as to a juror incident is entitled to a presumption of correctness, if the jurors involved were voir dired on the record, 455 U.S. at 217. Also in Smith, 455 U.S. at 221-2, Justice O'Connor stated as follows in her concurrence:

"Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of juror bias arises from juror misconduct, and not simply from attempts of third parties to inf1uence a juror ."

Curiously, only a year prior to its decision in the instant case, the N.H. Supreme Court applied a rule of law that was a correct gloss on Smith. In State v. Bathalon, 146 N.H. 485 (2001) , that court said,

"When confronted with an allegation of improper intrajury conduct, especially where it is alleged that a juror improperly concluded guilt or innocence...the trial court should generally remove the offending juror from the panel and undertake individual voir dire..."

The position that the N.H. Supreme Court adopted in Bathalon and abandoned in the instant case is consistent with this Court's requirement for on-the-record voir dire as to juror incidents. Any other position simultaneously places the burden of proof of prejudice on an accused and deprives him of the means of meeting that burden of proof, thus violating due process through that Kafka-esque result.

"There is a kaleidoscopic variety of possible problems" with a jury that can arise during the course of a trial." U.S. v. Gaston-Brito, 64 F.3d 11, 12 (1st Cir. 1995) (internal quotation marks and citations omitted). Thus, the specific incidents that occurred in the cases discussed herein are presumably examples but not limits of when a trial judge should conduct mid-trial voir dire. The failure of a trial court to voir dire jurors as to an incident may result in a record that is too opaque to be untangled on appeal. Concerning such a sce-

nario, one United States Court of Appeals held in U.S. v. Resko, 3 F.3d 684 (3d Cir. 1993):

> "...where the jury misconduct was discovered mid-trial but there is no way for [an appeals court] to determine whether or not the defendants were prejudiced, we reverse and remand for a new trial, even though the defendants have not established prejudice...the [trial] court erred be declining to engage in...individualized voir dire... By failing to do so, the [trial] court allowed the jurors, in effect, to be the judges of whether or not they had been influenced...Given the importance of the Sixth Amendment rights at stake and the relative ease with which the [trial] court could have properly assessed the misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice ."

Finally, in U.S. v. Jenkins, 380 U.S. 445 (1965), this Court vacated a conviction and remanded the case for anew trial where a trial judge had told a jury that it must continue deliberating until it had a verdict on both counts of a two-count indictment; the jury had sent the judge a note saying it had a verdict on only one count. The apparent ratio decidendi of Jenkins is that a trial judge must not become an unwitting accomplice in the possible coercion of holdout jurors by a majority.

In short, this Court has held that (a) a criminal defendant's allegation of a possibly prejudicial juror incident triggers mandatory on-the-record voir dire, (b) extrinsic and intrinsic juror incidents both fall within this rule, (c) that a trial judge's findings following such voir dire are entitled to deference on appeal, and (d) a trial judge must not tell a jury that has a verdict on only one count to continue deliberating until it has a verdict on all counts.

However, the N.H. Supreme Court made diametrically opposite holdings on each of the above four points, that (a) a defendant must prove actual prejudice due to a juror incident

before he can get a hearing to look into whether such proof exists. (b) intrinsic jury incidents are less worthy of investigation than are extrinsic jury incidents, (c) a trial judge's findings as to whether a jury incident occurred and whether it prejudiced the jurors are entitled to deference on appeal absent voir dire, and (d) a trial judge's jury instruction to keep deliberating until a verdict is reached on all counts is proof positive that the judge has appropriately resolved an intrinsic jury incident. In addition to squarely contradicting long-existing federal case law, the state court's holding is an example of circular reasoning; the state court will not allow a hearing into juror prejudice absent pre-existing proof of such prejudice, but will allow such a hearing where it is redundant because the proof of prejudice is already in hand.

As with the Confrontation Clause issue discussed in the previous section of this petition, this issue breaks little new ground in the law. Rather, it is a situation where a state court has decided an issue in a way that conflicts with this Court's well-settled precedents. Therefore, certiorari should be granted here.

IV. CERTIORARI SHOULD BE GRANTED WHERE A STATE SUPREME COURT HELD THAT NO EVIDENTIARY HEARING IS REQUIRED AS TO A RECANTATION OF PERJURED TESTIMONY BY A PROSECUTION WITNESS.

The petitioner asks this Court to hold that an evidentiary hearing is required by due process when evidence of a prosecution witness having committed and recanted perjury surfaces after trial. There is a split amongst the U.S. Courts of Appeals on this issue. This issue will decide the rest of the petitioner's life and is a situation that recurs frequently in jurisdictions throughout the United States.

In the instant case, the New Hampshire Supreme Court held that no evidentiary hearing is required on a motion for a new trial where a state's witness has entirely recanted his trial testimony and made a new statement to a third party com-

pletely exculpating the petitioner, in a case that rested entirely upon the uncorroborated testimony of alleged accomplices. That holding was based upon the state supreme court's opinion that due process is not violated where the state did not suborn perjury by its witness, but where that witness's perjury became apparent after trial.

This Court's foundational case on prosecution witness perjury is Napue v. Illinois, 360 U.S. 264, 269 (1959). Napue requires a new trial if either prong of a two-prong test is triggered. The first prong is where the state suborns perjury. The second prong is failure to correct perjury where it appears without having been solicited. The New Hampshire Supreme Court implicitly held that only the first prong of Napue is good law and that the second prong is mere dicta. However, that holding is contrary to the plain words of the Napue Court, as follows:

> "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment... The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears...It is of no consequence that the falsehood bore upon the witness's credibility rather than the defendant's guilt." (Internal citations omitted.)

In the instant case, the recantation of perjury by a prosecution witness went directly to the petitioner's guilt or innocence. The Napue Court went on to say that the fact that the prosecution witness in question was impeached on other grounds does not turn a tainted trial into a fair one, and that the question of whether there was a violation of due process as a result of perjured testimony is reviewed de novo on appeal. Id., 360 U.S. at 270-1.

The history of the second prong of Napue and the way that various courts have treated it merits consideration. The petitioner submits that the genesis of the second prong of Napue is to be found in a four-justice dissent pre-dating Napue by three years. In Durley v. Mayo, 351 U.S. 277 (1956), petitioner Durley was serving a thirty year sentence at the Florida state prison for theft of livestock (by contrast, the petitioner in the instant case is serving a life sentence without possibility of parole). His conviction, like the petitioner's, rested upon uncorroborated accomplice testimony. After his trial, prosecution witnesses recanted and admitted that they had born false witness against an entirely innocent man. Durley commenced litigation in the Florida courts to vacate his conviction. Durley made procedural errors in his pro se litigation, and the Florida Supreme Court declined relief on procedural grounds.

When Durley's petition reached this Court, five justices felt that they were barred by the procedural default from reaching the merits of the case. Four justices joined in a dissent; they felt that a shocking miscarriage of justice was being swept under the rug. Specifically, they asserted that due process requires an evidentiary hearing where a prosecution witness, after trial, recants perjured testimony. Durley, 351 U.S. at 290.

Three years after Durley, this Court unanimously announced the Napue decision, which was written by one of the Durley dissenters. It may be inferred that the second prong of Napue was intended to address the Durley horror—unconscionable state inaction in the face of recanted perjury.

Willful state blindness as to prosecution witness perjury was also the subject of Chambers v. Mississippi, 410 U.S. 284, 299-302 (1973), fourteen years after Napue. In Chambers, this Court struck down a state rule of evidence that rendered inadmissible a third party's account of a prosecution witness's recantation of perjury. Recently, this Court has described the pre-Chambers state of the law as a "barbarous doctrine". Lilly v. Virginia, 527 U.S. 116, 127-130 (1999). Thus, this Court has

repeatedly had to address the chronic unwillingness of states to face up to miscarriages of justice through prosecution witness perjury.

The government is barred from accomplishing indirectly what it cannot do directly. Rutan v. Republican Party of Ill., 497 U.S. 62, 77-78 (1990) (First Amendment issue). Thus, this Court should now hold that states can no more sustain a conviction through willful blindness as to recantations of perjury than they can obtain a conviction through subornation of perjury. Such a holding will resolve a split in the circuits on this issue.

Three circuits have held that due process requires an evidentiary hearing as to a recantation of non-suborned perjury by a prosecution witness. Sanders v. Sullivan, 863 F.2d 218, 225 (2d Cir. 1988), Cornell v. Nix, 921 F.2d 769, 771 (2d Cir. 1990), cert. den. 507 U.S. 1020, Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991), U.S. v. Page, 828 F.2d 1476, 1478 (10th Cir. 1987), cert. den. 484 U.S. 989.

All three of the above circuits have also held that prosecutorial use of perjury that is not knowing but is reckless, or prosecutorial use of perjury that the prosecutor did not know of but should have, is analytically indistinguishable from prosecutorial subornation of perjury. U.S. v. Torres, 128 F.3d 38, 49 (2d Cir. 1997), cert. den. 5'23 U.S. 1065, U.S. v. Tierney, 947 F.2d 854, 860-1 (8th Cir. 1991), U.S. v. Sinclair, 109 F.3d 1527, 1532 (10th Cir. 1997). The First Circuit has discussed the possibility that it would adopt the Torres/Tierney/Sinclair doctrine if an appropriate case presented itself. U.S. v. Gonzalez-Gonzalez, 258 F.3d 16, 21 (1st Cir. 2001), U.S. v. Huddleston, 194 F.3d 214, 221 (1st Cir. 1999). This line of cases is consistent with the doctrine that a prosecutor should seek justice, not merely victory. U.S. v. Doe, 860 F.2d 488, 494 (1st Cir. 1988). Thus, it is both unseemly and unconstitutional for a state to refuse to air out at an evidentiary hearing post-trial indications that a prosecution witness is a perjurer.

However, several of the circuits have held that no action is required as to post-trial evidence of prosecution witness

perjury. Those circuits have all held that Napue only applies to prosecutorial subornation of perjury. Smith v. Black, 904 F.2d 950 (5th Cir. 1990), Reddick v. Haws, 120 F.3d 714 (7th Cir. 1997), Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992). Each of those cases explicitly rejects the Second Circuit's holding in Sanders v. Sullivan, supra.

Thus, on this issue, there is a split in the circuits and a split between the New Hampshire Supreme Court and several of the circuits as to whether due process requires an evidentiary hearing where evidence of a recantation of prosecution witness perjury surfaces after trial. It is better public policy to require such a hearing. The cost of a hearing is minimal. If the hearing establishes that a new trial is required due to prosecution witness perjury, there is no harm to the prosecution, because there is no legitimate governmental interest in sustaining a conviction which rests upon false evidence. On the other hand, if such a hearing is refused, a double miscarriage of justice -a false conviction (and, in the instant case, a life sentence without parole) and unpunished perjury -will forever go unremedied. Certiorari should be granted to resolve this fundamental issue.

Prayers For Relief

WHEREFORE, for all the above reasons, this Honorable Court should grant a writ of certiorari directed to the New Hampshire Supreme Court.

Respectfully Submitted,
Seth Bader, Petitioner,
by his Attorney

s/

B. Michael Cormier
86 Summer Street
Haverhill, MA 01830
978-374-0924

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Date